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No. 99-1994

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In The

Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,

Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; HONORABLE JOSEPH VAN WALRAVEN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE THLOPTHLOCCO TRIBAL TOWN & THE SAC AND FOX NATION AS AMICI CURIAE SUPPORTING AFFIRMANCE FOR RESPONDENT, FALLON PAIUTE-SHOSHONE TRIBES, HONORABLE JOSEPH N. WALRAVEN

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BRIEF FOR THE THLOPTHLOCCO TRIBAL TOWN & THE SAC AND FOX NATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS, FALLON PAIUTE-SHOSHONETRIBES and JOSEPH N. WALLRAVEN, HON.

The Thlopthlocco Tribal Town and the Sac & Fox Nation respectfully submit this Brief Amici Curiae, with the consent of all parties, pursuant to Sup. Ct. R. 37.3.[1]

INTERESTS OF AMICI SUPPORTING THE FALLON PAIUTE-SHOSHONE TRIBES, AND JOSEPH N. WALLRAVEN, HON.

Amici, two federally recognized Indian tribes within the State of Oklahoma, urge the Court to: (i) uphold tribal sovereignty as applied to the facts of this case; (ii) uphold the presumption of tribal court jurisdiction over civil disputes arising in Indian country in the first instance; and (iii) defer to the power of Congress to allocate tribal governmental authority in the American governmental system. The position urged by Respondents provides coherence and predictability in federal Indian law, implements the Constitution's plan that Congress control the relationships between tribes, states and the federal government, – including Congress' recognition of the inherent tribal civil-adjudicatory powers over non-members acting in Indian country.

Amici have strong interests in protecting the inherent powers of Indian tribes to develop and enforce tribal law and to determine facts and their jurisdictional authority initially in civil disputes in Indian country. The possibility that individual state officials would be able to come

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[1] Pursuant to Sup. Ct. R. 37.6 counsel for Amici state that no counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amici Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. Letters of consent of the parties are filed herewith.

upon Indian country, disregard tribal law and the orders of tribal courts, ignore the federal statutory and constitutional norms protecting individuals from unreasonable searches and seizures, and escape civil accountability in the tribe's courts, offends fundamental notions of fairness, tribal sovereignty, and the right of tribes to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

The Petitioners acted on the reservation and on trust land. Pet. App. A3, B2, F1, G1, H1-H2, I2-I3.[2] This case differs from *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (action arising on state highway right of way to which tribe ceded jurisdiction) and *Montana v. United States*, 450 U.S. 544 (1981) (action involving non-Indian fee land). Even if Mr. Hicks' home was on alienated fee land (which it is not) the individuals' alleged actions threaten the tribe's political integrity and welfare. The individuals, acting pursuant to tribal court's authorization and with tribal police assistance, allegedly exceeded the terms of specific search warrant permissions. Pet. App. G1; Jt. App. 10. Although the individuals characterize Mr. Hicks' claims as "novel," Petitioners Br. 18, it is clear individual tribal members have reasonable expectations "to be secure in their persons, houses, papers, and effects against unreasonable search and seizures" under federal and tribal law. Indian Civil Rights Act, 25 U.S.C. 1302(2) ("ICRA"); U.S. Const., Fifth and Fourteenth Amendments.[3] This Court has held that the majority of such

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[2] The Petitioners are Nevada state game wardens who Mr. Hicks, a tribal member (Pet. App. A-3, B-2, H-1) alleges acted outside the authority granted them either by the state or by the tribe. Pet. App. A4, H2-H8, I2-I4. *See Ex Parte Young*, 209 U.S. 123, 159-160 (1908). Petitioners are hereinafter referred to as the "individuals." Petitioner Mr. Molini does not appear from the record to have acted personally within Indian country.

[3] Mr. Hicks seeks relief for civil rights violations pursuant to the ICRA, federal and tribal law. Jt. App. 13-19. Fundamental

federal ICRA claims are enforceable only in tribal court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-72 (1978) (United States courts only hold jurisdiction to hear habeas corpus relief claims under ICRA; "[T]ribal forums are available to vindicate rights created by the ICRA. . . ," *Id.* at 65). Indian tribes have reasonable and legitimate expectations to govern their Indian country. The tribal court should exercise supervisory power over the search warrants and should have jurisdiction initially to consider the individuals' affirmative defenses such as qualified immunity.

SUMMARY OF ARGUMENT

Indian tribes retain inherent powers to adjudicate civil disputes arising in "Indian country" whether the parties are members or non-members, or are Indian or non-Indian. These powers predate the Constitution.

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tribal constitutional rights, the same or similar to the federal Bill of Rights, are found in many tribal constitutions. *See, e.g.*, the CONSTITUTION OF THE SAC AND FOX NATION, Art. X, Sec. 2 provides that the Nation shall not

> Violate the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

See also THE CONSTITUTION OF THE KAW NATION, Art. VI, Sec. 2, another federally recognized Indian tribe in Oklahoma (same); and THE CONSTITUTION AND BYLAWS OF THE THLOPTHLOCCO TRIBAL TOWN, Art. I, Sec. 2 adopting the laws of the United States, so that Thlopthlocco citizens are

> secure and obtain the benefits, rights and privileges, and powers provided for by any laws of the United States now existing or that may hereafter be enacted for the benefit of Indians or other citizens of the United States. . . .

Under the "Indian Commerce Clause," U.S. CONST. ART. I, § 8, cl. 3, Congress alone has the power to determine or alter the scope of inherent tribal civil-adjudicatory powers. Congress has consistently demonstrated that it knows how to modify tribal court powers, *how, where and when it wants to.* "This Court has consistently guarded the authority of Indian governments over their reservations . . . . If this power is to be taken away from them, it is for Congress to do it." *Williams*, 358 U.S. at 223. Congress has declined to restrict tribal court jurisdiction over non-members in Indian country, and in a number of instances has recognized explicitly tribal jurisdiction over non-members.

When members and non-members act in Indian country, tribal courts should adjudicate the civil disputes in the first instance pursuant to the well-established Exhaustion Doctrine. *See e.g., National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985). As a general matter, tribal courts are best situated to hear factual evidence initially and develop a record. And as a general matter, federal courts retain federal-question jurisdiction over a tribal court's jurisdictional determinations. In this case, however, the factual record remains undeveloped and the individuals' potential qualified immunity defenses to the tribal court's subject matter jurisdiction remain unasserted. Pet. App. A12-A14, B16.

This Court has recognized tribal courts as appropriate institutions to adjudicate civil disputes in the first instance involving Indians and non-Indians. *See Williams; Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *National Farmers*, and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). Congress and the Executive branch recognize the government-to-government relationship between tribes and the United States. 25 U.S.C. § 3601(1)-(5). Principles of comity and deference support tribal court jurisdiction and exhaustion of tribal court remedies.

Tribes should be free to exert their powers of self-government when the civil disputes arise on Indian country. Such disputes warrant, justify and require the exercise of the strongest of sovereign powers – to defend one's territory. Otherwise, tribes are nothing more than mere absentee landlords. This Court has long held that civil disputes involving members and non-members arising on Indian country are first subject to tribal court jurisdiction. *See, e.g., Williams; Santa Clara; National Farmers;* and *Iowa Mutual*. Since Congress – aware of the Court's holdings – has elected *not* to modify that result, Amici urge this Court to treat the Congressional will as conclusive.[4] With 556 federally recognized Indian tribes in the United States, the tribal sovereign interests recognized by treaty and statute are complex and diverse.[5] The balancing of governmental powers in our American structure, including tribal court jurisdiction over non-Indians, is a distinctly political question – a question for Congress to decide. Respect for the intergovernmental relationships between tribes and the federal government demands that, in the absence of a specific federal statute or explicit treaty provision relinquishing tribal power, the Court should preserve the inherent civil powers of tribes over Indian country. *Iowa Mutual*, 480 U.S. at 18.

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[4] In fact, Congress has taken note of this Court's conclusion regarding the presumption of tribal court civil jurisdiction. The Conference Report accompanying the Indian Tribal Justice Act, 25 U.S.C. § 3601 *et seq.*, stated that *"civil jurisdiction on an Indian reservation 'presumptively lies in tribal court,* unless affirmatively limited by specific treaty provision or federal statute.' " H.R. Conf. Rep. No. 383, 103rd Cong., 1st Sess. 13 (1993) (quoting *Iowa Mutual*, 480 U.S. at 18) (emphasis added). Congress also legislatively rejected this Court's policy conclusions in *Duro v. Reina*, 496 U.S. 676 (1990).

[5] Bureau of Indian Affairs List of Federally Recognized Tribes, March 13, 2000, 65 FED. REG. 13298-13303. The Petitioners acknowledge "twenty-six tribes and bands in Nevada alone." Br. 23.

The Constitution's allocation of sovereign power is only relevant to the extent that tribes exert inherent, pre-Constitutional powers that remain undiminished except as abrogated by Congress. Mr. Hicks dismissed his claims against the individuals in their official capacity. Pet. App. A5, G1. Absolute immunity and Eleventh Amendment constraints are not at issue here. Federal courts can review a tribal court's qualified immunity determinations after the tribal court has determined the facts and established a record. Qualified immunity remains an affirmative defense which the individual officers first should assert in the tribal court. It is not a jurisdictional bar. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

The current rule – that tribes exert self-governmental civil powers over the conduct of non-members and over non-Indians within Indian country – promotes and advances important Congressional Indian policies, including fostering self-determination and "protecting the sovereignty of each tribal government"; *see* 25 U.S.C. § 3601(2) (1994). This principle does not violate reasonable expectations of non-Indians entering Indian country (particularly as here where the State court recognized it had no jurisdiction within Indian country and directed the individuals to seek express tribal court consent in advance). Pet. App. A10, G1. In addition, the rule does not hinder the effective administration of justice among sovereigns. To the contrary, if tribal courts know that granting search warrants to non-tribal law enforcement officers means that the tribal court will lose supervisory and adjudicatory powers over (i) its warrants, (ii) the individuals, and (iii) its Indian country jurisdiction, then tribal courts would choose to deny assistance and exclude the individual officials. Such a result would chill government-to-government relationships and hinder regional law enforcement.

This Court has recognized that tribes may "oust" non-Indians granted permission to enter the reservation if they do not comply "with the initial conditions of entry." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144

(1982). There are no sound reasons for any other ruling. Finally, the traditional case law recognizing tribal court jurisdiction over non-members acting on Indian country is neither "unworkable [n]or badly reasoned." *Cf. Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (applying those tests to questions of *stare decisis*).[6]

Tribal courts are competent to adjudicate factual questions and federal legal issues of immunity. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 485 n. 7 (1999) (federal law); and *Santa Clara Pueblo*, 436 U.S. at. 65 (same).

Because Mr. Hicks has sued the individuals in their personal capacities, the State of Nevada's Eleventh Amendment immunities are not implicated. Rather, Mr. Hicks seeks to hold accountable the individuals he alleges acted in excess of their official responsibilities and in derogation of tribal, federal statutory, and constitutional laws protecting individual rights. Amici support the availability of qualified immunity defenses to all government officers – be they tribal, federal or state – when they act in their official capacities. Qualified immunity protects officers doing their jobs and promotes effective government. However, the tribal court should retain its jurisdiction over (i) warrants it issues, (ii) civil claims that arise within its Indian country, and (iii) the opportunity to adjudicate affirmative qualified immunity defenses in the first instance.

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[6] *See generally Patterson v. McClean Credit Union*, 491 U.S. 164, 172-73 (1989) (emphasis added) ("[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, *unlike in the context of constitutional interpretation*, . . . Congress remains free to alter what we have done.") (emphasis added); *Patterson v. McClean Credit Union*, 485 U.S. 617, 621 (1988) (Blackmun, J., dissenting from order directing rehearing) ("The parties in this case have not informed us of anything that suggests Congress has reconsidered its position on this statutory matter. . . . ").

ARGUMENT AND AUTHORITIES

I. Indian tribal courts have jurisdiction over claims brought by a tribal member against non-Indians in their individual capacities when the conduct arises on the reservation, and on trust land.

A. Tribes retain inherent sovereign territorial power in civil cases unless Congress limits those tribal civil-adjudicatory powers or tribes affirmatively relinquish control over their territory.

This Court has consistently recognized the undiminished powers of Indian tribal governments over their territory in civil matters involving members, except as limited by Congress or by the tribes themselves. Indian tribes derive their sovereignty from their status as extra-constitutional, domestic-dependent nations; they hold undiminished powers, except as limited by Congress or tribes themselves. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978); *United States v. U.S. Fidelity Co.*, 309 U.S. 506, 512 (1940).[7]

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[7] In 1942, Felix Cohen articulated the place of tribal governmental powers in the American system of government:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates external powers of sovereignty of the tribe, e.g. its powers to enter into treaties with foreign nations, but does not affect the internal sovereignty of the tribe, i.e. its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the

Tribes do not rely on Congress or treaties for their powers; tribal governmental powers are inherent. *E.g.*, *United States v. Wheeler*, 435 U.S. 313, 320-30 (1978); *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896) (in finding that the Constitution did not apply to the Cherokee Nation grand jury procedure to prosecute a tribal member, the Court found tribal powers were not "Federal powers created by or springing from the Constitution," but rather "existed prior to the Constitution.") "Neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity." FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 231 (R. Strickland et al., eds., 1982). Governmental powers vested in Indian tribes are "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). Tribes retain the inherent power to exclude non-members. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (inherent power to tax, regulate and exclude non-Indians); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (power to exclude non-members). Certainly the power to exclude persons from tribal territory contains in it the power to regulate persons on tribal territory. The Ninth Circuit, Pet. App. A13, thoughtfully reasoned:

> Any sovereign, even a limited sovereign, must have the power to adjudicate whatever it has the power to legislate. A sovereign who must depend on the courts of another sovereign to adjudicate violations of its own rules is little more than a landowner.

Indian tribes and in their duly constituted organs of government.

FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942 & photo. reprint 1986) (footnotes omitted). Cohen's articulation of inherent tribal powers remains consistent with this Court's federal Indian law jurisprudence and with Congress' power over Indian affairs.

In modern times this Court has decided fourteen cases involving tribal civil and criminal judicial powers over non-members acting on reservations.[8] All of the cases considered the sovereign powers of tribes over "Indian country."[9] Although the cases involved different

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[8] *See Williams v. Lee*, 358 U.S. 217 (1959); *United States v. Mazurie*, 419 U.S. 544 (1975); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980); *Montana v. United States*, 450 U.S. 544 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); and *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999).

[9] Congress defined "Indian country" for federal criminal purposes in a 1948 statute codifying this Court's common law jurisprudence at 18 U.S.C. § 1151 as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian rights to which have not been extinguished, including rights-of-way running through the same.

The Court has adopted Congress' Indian country definition for civil cases as well. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 177-78 n. 17 (1973); *DeCoteau v. District County Court*, 420 U.S. 425, 427-28 n. 2 (1975); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478-79 (1976); and *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993). The Court has also recognized the existence of "informal reservations" as

facts and legal issues, the Court has consistently applied reasoning in each dispute in favor of inherent tribal civil-adjudicatory powers over member/non-member disputes arising in Indian country where neither has the tribe relinquished powers nor has Congress legislated.

Petitioners argue that "[A] tribe's relationship with a nonmember, even on tribal land, simply is not generally an internal matter necessary for self-government." Br. 41. They contend "[n]one of [this Court's] precedents establishes a distinction based on that factor" referring to "land status." Br. 40-41. To the contrary, this Court has long recognized a significant geographic- or territorial-component to tribal sovereignty. *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (conceptualizing tribes *not* as "private, voluntary organizations" but as "unique aggregations possessing attributes of sovereignty over both their members and their territory."); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (protection of territory is "central" to the interests of any government); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (tribal powers include "a broad measure of civil jurisdiction over activities of non-Indians on reservation lands in which tribes have a significant interest."); and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982) ("there is a significant territorial component to tribal power."). The *Merrion* Court, 455 U.S. at 137, wrote that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."

This Court recently found that "tribes retain considerable control over non-member conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). The

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being Indian country in Oklahoma where most former reservations remain heavily allotted. *Sac & Fox Nation*, 508 U.S. at 123.

Court in *Strate, id.* at 451, recognized that "tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." Indian country land status remains the most reliable and easily discernable benchmark for demarcating tribal civil-adjudicatory jurisdiction.

Indian tribes hold the inherent right to exercise civil jurisdiction over territory they control. *Williams v. Lee*, 358 U.S. 217 (1959); *Fisher v. District Court*, 424 U.S. 382 (1976); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 103 (1982); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). This inherent governmental power is essential to tribes' survival. Accordingly, this Court has found that tribal courts remain "appropriate forums for the *exclusive* adjudication of disputes affecting important personal and property interests of *both Indians and non-Indians.*" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (emphasis added). Accordingly, an individual's voluntary presence in Indian country, within the reservation gives rise to a presumption of tribal civil-adjudicatory jurisdiction and to implied consent to tribal governmental authority over their conduct.[10]

The Court should not deny tribal jurisdiction in this case. Unlike *Montana* (involving tribal regulation of non-member fee land within the reservation) and *Strate* (involving only non-Indian parties, the action occurred on a state public highway where tribe had ceded jurisdiction, and the Court equated the road to non-member fee land), the alleged conduct in the instant case indisputably

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[10] With regard to reservation activities of non-Indians, civil jurisdiction "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18. One commentator notes that "[w]hat distinguishes tribal Indians from other groups is the claim of sovereignty – the right not simply to be self-governing, but to exercise dominion over land." L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 897 (1996).

took place on trust land and involved a tribal member. Even under the stringent test in *Montana*, 450 U.S. at 565-566, the conduct in this case involves "consensual relationships with the tribe or its members" and affects "the political integrity, the economic security, or the health and welfare of the tribe." *See also Strate*, 520 U.S. at 446. Like the numerous Indian tax cases this Court has decided, tribes have significant governmental interests in regulating non-members who come upon the reservation. Those tribal interests are at their greatest when non-Indian conduct occurs on trust land, within the reservation, and involves an Indian or Indian property.

In this case the individuals sought the consent of the tribal court before entering the reservation and obtained the services of tribal police to accompany them to serve the warrants on Mr. Hicks, on his property on his trust land, within the reservation. Pet. App. A3, A10, B2, H1-H2, I2-I3. Certainly the facts here implicate the tribe's "political integrity to control its lands." If Mr. Hicks' allegations are true, his "welfare" is jeopardized if the individual officers exceeded the search warrant and violated his right to be secure in his home from unreasonable searches and seizures.

This Court's opinion in *Oliphant* involved tribal *criminal* jurisdiction over a non-member, which this Court found historically lacking. This case, in contrast, involves tribal civil-adjudicatory authority. In *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 854 (1985), this Court easily distinguished *Oliphant*'s criminal jurisdiction principles from civil-adjudicatory cases involving non-Indians and recognized tribes' authority to control their lands.

In *Williams v. Lee*, 358 U.S. 217, 223 (1959), the Court held that the tribal court had exclusive jurisdiction over the collection of a debt owed by Indians to a non-Indian merchant on the reservation:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation

> affairs and hence would infringe on the right of Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the *authority of Indian governments over their reservations.*

(citations omitted, emphasis added).

In recent years, the Court stood by the tribes' civil authority in Indian country in the face of competing state interests. In *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123-24 (1993), the Court recognized again the right of tribes to be free from state jurisdiction in the absence of explicit Congressional authorization:

> We found a "deeply rooted" policy in our Nation's history of "leaving Indians free from state jurisdiction and control." 41 U.S., at 168 (internal quotation marks omitted). Indian nations, we noted, long have been " 'distinct political communities, having territorial boundaries, within which their authority is exclusive.' " *Ibid.* (quoting *Wocester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (Marshall, C.J.)). The Indian sovereignty doctrine, which gave state law "no role to play" within a tribe's territorial boundaries, did not provide "a definitive resolution of the issues," but it did "provid[e] a backdrop against which applicable treaties and federal statutes must be read." [*citing McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)][11]

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[11] *Worcester* concluded that because the federal-tribal relationship is exclusive, states have no role to play in Indian country. The Court also cites *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 178-179 (1980) (Rehnquist, J. concurring in part, concurring in result in part, and dissenting in part). *See also Rice v. Olson*, 324 U.S. 786, 789 (1945).

Amici submit that prior decisions and *stare decisis* require the Court to give great deference to Congress when deciding the scope of tribal civil-adjudicatory powers over non-members in Indian country. Although tribes are domestic-dependent sovereigns in the federal-tribal relationship, the Court should tread cautiously in areas where tribes have not ceded jurisdiction or areas where Congress has not abrogated those pre-existing tribal rights. *See, e.g., Merrion*, 455 U.S. at 149, *quoting Santa Clara*, 436 U.S. at 60 ("a proper respect for both tribal sovereignty itself, and for the plenary power of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."). Congressional action is required to alter the status quo of tribal civil-adjudicatory powers, and no such action was taken in this case.

B. The Court should uphold the prudential rule of presumptive deference to tribal courts to adjudicate civil disputes arising in Indian country involving tribal members and non-members in the first instance.

The United States supports, and is "committed to a policy supporting tribal self-government and self-determination." *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 & n. 20 (1985). "[T]ribal justice systems are an essential part of tribal governments," 25 U.S.C. § 3601(5).[12] The Executive Branch has also reaffirmed

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[12] The Indian Tribal Justice Act of 1993 further provides in full:

> The Congress finds and declares that –
>
> (1) there is a government-to-government relationship between the United States and each Indian tribe;
>
> (2) the United States has a trust responsibility to each tribal government that includes the

principles of inherent tribal sovereignty.[13]

The Petitioners claim that tribal courts are recent developments ("tak[ing] root [ ] two to three generations *after* . . . 1871") (emphasis original). Br. at 26. Contrary to such assertions, it is beyond cavil that tribal dispute resolution processes antedate the founding of the United States of America.[14] The Cherokee Nation operated its

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protection of the sovereignty of each tribal government;

(3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;

(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;

(5) tribal justice systems are an essential part of tribal governments and serve important forums for ensuring public health and safety and the political integrity of tribal governments;

(6) Congress and the federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property interests.

[13] *See Revised Executive Order on Consultation with Indian Tribal Governments*, Exec. Order No. 13,175, 65 FED. REG. 67,249-67,252 (Nov. 6, 2000); *Consultation and Coordination with Indian Tribal Governments*, Exec. Order No. 13,084, 63 FED. REG. 27,655 (1998); *Government-to-Government Relations with Native American Tribal Governments: Memorandum for Heads of Executive Departments and Agencies*, 59 FED. REG. 22,951 (1994).

[14] *See, e.g.*, ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC 15 (2d ed. 1961) (describing ancient processes of the Choctaw Nation); KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY 41-340 (1941) (describing traditional and evolving dispute-resolution procedures of the Cheyenne Tribe); RENNARD STRICKLAND, FIRE AND THE SPIRITS 21-33 (1975) (describing

own courts in Indian territory (later day Oklahoma) beginning in 1867,[15] and the United States began assisting some tribes by offering Courts of Indian Offenses since the 1880s.[16] Today, many of the 556 federally recognized tribes have formal and well-developed judicial systems to adjudicate civil disputes arising in Indian country.[17] Many tribal governments employ judges and justices who are lawyers, law professors, retired state and federal judges and are both Indian and non-Indian. Most of the thirty-nine federally recognized tribes in Oklahoma have modern, efficient and well-equipped tribal court systems staffed by professional judges and court staff.[18] The United States has provided extensive assistance to

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basic legal precepts of the Cherokee Nation as they existed in the 1700s); Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 7, 8-30 (1994) (Tribal Courts Symposium).

[15] Strickland, *id.* at 158-67 (describing operation of Cherokee courts in the Nineteenth century until their abolishment under the Curtis Act in 1898).

[16] *See, e.g.*, WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES 104-25 (1966).

[17] *See* U.S. COMM'N ON CIVIL RIGHTS, *The Indian Civil Rights Act* 29-31 (1991); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 332-335 (R. Strickland, et al. eds. 1982).

[18] The Sac & Fox Nation has a professional and well-developed tribal district and appellate court structure over three decades old and staffed by law school trained judges pursuant to tribal law. The Thlopthlocco Tribal Town is developing its tribal governmental structures and plans to establish a tribal court as governmental funds become available. *See also* Arrow, *supra* at n. 13 at 44-80, describing the history and development of tribal courts; OKLAHOMA TRIBAL COURT REPORTS (Dennis W. Arrow, Ed.) Vols. 1-5 compiling many modern Oklahoma tribal court decisions from 1979 to date and RENNARD STRICKLAND, THE INDIANS IN OKLAHOMA 76-77 (1980) describing the rebirth of tribal courts in Oklahoma.

encourage the development of tribal court systems.[19] In short, tribal courts in recent decades have developed "in leaps and bounds."[20]

In *National Farmers*, 471 U.S. at 856-57, and *Iowa Mutual*, 480 U.S. at 18, this Court made it clear that in cases arising in Indian country, *federal* courts must abstain from the exercise of jurisdiction. Jurisdictional issues and the merits of the case are to be resolved in the appropriate tribal court. In *Iowa Mutual*, 480 U.S. at 19, the Court noted an important substantive limitation on federal court review: where tribal court subject matter jurisdiction exists, "proper deference to the tribal court system precludes relitigation of issues" raised and resolved in tribal courts. The Court noted the importance of tribal courts in the American system such that the "federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts." 480 U.S. at 16-17.

A requirement that litigants exhaust tribal court remedies promotes an important policy – a policy frequently invoked in administrative law cases: Specialized hearing bodies should be given the first opportunity to apply their informed judgment to a particular issue.[21] Tribal court judges have specialized expertise and experience in adjudicating matters involving tribal laws and custom, as well as federal laws and regulations that extensively regulate everyday life in Indian country.

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[19] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 & n. 21 (1978); *see also* Indian Tribal Justice Technical and Legal Assistance Act of 2000, §§ 2, 101, 106, 201, 202, Pub. L. No. 106-559, 114 Stat. 2778 (finding presumptive civil jurisdiction for tribal courts unless affirmatively limited by statute or treaty and authorizing appropriations for tribal justice systems).

[20] Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 2 (1997).

[21] *National Farmers*, 471 U.S. at 856; *cf. Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

In *Iowa Mutual*, the Court stated:

> In diversity cases, as well as *federal-question cases*, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. *Adjudication of such matters by any nontribal court also infringes upon tribal lawmaking authority*, because tribal courts are best qualified to interpret and apply tribal law.

480 U.S. at 16 (emphasis added) (citations omitted).

Further, under the Exhaustion Doctrine, tribal courts have the opportunity to make *nisi prius* determinations of the limits of their own authority. This prudential rule of abstention avoids concurrent litigation in tribal and federal courts and promotes judicial economy. Contrary to the States Attorney Generals' Amici Brief in support of Petitioner (Br. p. 8), tribal court decisions are reviewable before tribal appellate Courts, *Iowa Mutual*, 480 U.S. at 16-18, and the tribal court's determination of its jurisdiction is reviewable in federal court. A tribal court is best situated to apply its own laws, to take evidence, to determine facts from witnesses readily available on the reservation.

In *National Farmers*, 471 U.S. at 856-57 (footnotes omitted), this Court explained the policy reasons for the abstention doctrine:

> We believe that examination should be conducted in the first instance in the tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either

> the merits or any question concerning appropriate relief is addressed . . . Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

In summary, tribal courts deserve the respect and deference appropriate to the courts of sovereign entities: tribal courts should be given an opportunity to decide the extent of their jurisdiction as an initial matter.

The Petitioners can point to no treaty where the Fallon Paiute-Shoshone Tribe has relinquished civil-adjudicatory power or where Congress has divested tribes of such inherent powers. Accordingly, this tribe and its tribal court's inherent civil-adjudicatory powers remain intact. To the contrary, Congress provided all states including Nevada, with the only whole-scale opportunity to assume civil jurisdiction over Indian country located within their borders pursuant to P.L. 83-280.[22] Although Nevada initially assumed jurisdiction over much Indian country in its state, Nevada later retroceded all civil and criminal jurisdiction over Indian country in 1975 and in 1988. 25 U.S.C. § 1323 (1983 and 2000 Supp.); 40 FED. REG. 27,501 (1975); 53 FED. REG. 5837 (1988); Nev. Rev. Stat. § 41.430 (1999). No other Indian tribe in Nevada, including the Fallon Paiute-Shoshone Tribe, has since consented to Nevada state jurisdiction. As will be demonstrated below, where Congress has not spoken explicitly, and the tribe has not specifically given up powers in a bargained-for exchange, tribal civil-adjudicatory powers remain intact.

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[22] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588. Later, Congress added a tribal consent requirement before states could assume jurisdiction. Pub. L. No. 90-284, Title IV, 82 Stat. 73 (1968) (codified in relevant part at 25 U.S.C. §§ 1321(a), 1322(a) (1983 and 2000 Supp.).

Iowa Mutual, and more recently, *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473 (1999) have settled the issue that tribal courts are competent to adjudicate federal law issues. Tribes adjudicate federal claims on a regular basis. Tribal courts can and do adopt federal statutory and common law on a daily basis to resolve disputes. The Cherokee Nation, for example, has adopted the Federal Rules of Civil Procedure and the Federal Rules of Evidence unless superceded by a Cherokee Nation rule for its judicial system. 12 C.N.C.A. § 1 (1993).

For the "exhaustion requirement" to have any real meaning tribal courts should have initial civil-adjudicatory jurisdiction over their territory, even for federal civil rights claims. Such jurisdiction over non-Indians engenders the very legitimacy of tribal courts and their survival as tribal governmental institutions. If a tribal court cannot even maintain supervisory jurisdiction over a search warrant it approved, then a tribal court's powers are illusory. A government that loses the power to regulate civil matters loses its identity. Non-Indian interests are at a minimum when the non-Indian (i) is on the reservation, (ii) is on trust land, (iii) enters into a consensual relationship with the tribe, (iv) acts pursuant to an explicit and limited permission granted by a tribal court, and (v) uses tribal governmental services.

C. The Court should defer to Congress' plenary power to alter current allocations of tribal adjudicatory authority.

The Constitution mentions tribes three times[23] but does not clearly delineate the relationships between tribes, the United States and the states. However, this

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[23] Congress may regulate commerce "with the Indian Tribes," U.S. CONST. Art. I, § 8, cl. 3 and "Indians not taxed" are not counted when appropriating House of Representatives, U.S. CONST. § 2, cl. 3; U.S. CONST. Amend. XIV, § 2.

Court has repeatedly recognized that the "Indian commerce clause" grants Congress plenary authority to control the relationship between Indians and the United States. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *see, e.g., United States v. Kagama*, 118 U.S. 375, 380 (1886) (holding that Congress may criminalize even purely intratribal misconduct on the reservation); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (Congress had "Plenary authority over the tribal relations with the Indians . . . a political [authority], not subject to be controlled by the judicial department of the government."); *United States v. Sandoval*, 231 U.S. 28, 34 (1913) (holding Congress' power extends even to Indians who are citizens and who hold property in fee simple). *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). "If this power is to be taken away from them, it is for Congress to do it." *Williams*, 358 U.S. at 223.

This Court from time to time has offered the reminder that generalizations are "particularly treacherous" in the field of Indian law. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1980). Given the complex character of the relationship of tribes to the broader American system of government and the difficulty of balancing competing interests of non-members, curtailing the inherent civil-adjudicatory powers of tribal governments over Indian country is a political decision best left to Congress. This Court should not intrude upon a legislative function by altering express tribal civil-adjudicatory powers without Congressional guidance.[24]

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[24] *Santa Clara Pueblo*, 436 U.S. at 58; *cf. United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 354 (1941) (applying Indian law "canons of construction," pursuant to which ambiguous expressions in federal statutes will not be construed in a manner constrictive of tribal rights); *Bryan v. Itasia Co.*, 426 U.S. 373, 392 (1976) (Congressional intent to deprive Indians of their rights will not be implied); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship

The Court should not find a statutory abrogation of tribal civil-adjudicatory powers unless Congress has expressed a clear intent to do so. The special Indian law canons of construction reflect the unique sovereign-to-sovereign relationship and the special trust relationship between the United States and tribes. 25 U.S.C. § 3601 (1)-(2).

This Court has historically recognized Congress to be the exclusive authority to define, fulfill, and apply the federal trust responsibility to Indian tribes:

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.

Morton v. Mancari, 417 U.S. 535, 551-552 (1974).[25]

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between the United States and the Indians."); and *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751 (1998) (this Court refused to abolish tribes' inherent immunity to unconsented suits where Congress has not legislated blanket tribal immunity; the Court left the issue for Congress). *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: the Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 85 (1999) (concluding that evaluating the adequacy of protecting non-Indians from tribal authority in Indian country is a policy choice best left to Congress because the considerations are "inherently political and not easily subject to judicial balancing and resolution.").

[25] Congress is the primary obligor and interpreter of the trust responsibility towards Indian tribes. *See, e.g., United States v. Mitchell*, 445 U.S. 535, 540-46 (1980). This Court has historically deferred to Congressional actions (and inactions) in that field. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 56-72 (declining to diminish tribal sovereign immunity to an extent greater than Congress had done in the Indian Civil Rights Act of 1968). This Court held in *Mancari*, 417 U.S. at 455:

> [A]s long as the special treatment can be rationally tied to the fulfillment of Congress' unique obligation

The Court has found in the context of tribal sovereign immunity that modern Congressional reaffirmations

> . . . reflect Congress' desire to promote the good of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development.

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 510 (1991) (internal quotation marks and citation omitted); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Congress has not disturbed federal case law regarding tribal civil-adjudicatory powers over non-members and non-Indians. This Congressional silence suggests that Congress is satisfied with the status quo. Amici respectfully submit that policy choices regarding the jurisdiction of tribal courts are best left to Congress.

Long ago this Court also recognized that non-Indians who enter Indian country must take tribal law as they find it. *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823).

> toward the Indians, such legislative judgments will not be disturbed.

To diminish tribal court civil-adjudicatory powers over non-Indians acting within Indian country would undermine the contemporary Congressional policies promoting tribal self-determination, economic self-sufficiency and intrude in areas where Congress enjoys plenary power.

Contrary to the States Att. Gen. Amici Brief suggesting the Court should adopt Congress' intent behind the Allotment Act over a century ago to end tribal land ownership and substitute private ownership to facilitate the assimilation of tribes, Br. at 2, Congress abandoned this policy over a half century ago with the passage of the Indian Reorganization Act, 25 U.S.C. § 476 *et seq.* The current Congressional policy promotes tribal self-determination and support for tribal governments, including tribal courts. 25 U.S.C. § 3601(1)-(6).

Only a federal statute or treaty can extinguish the aboriginal jurisdiction of tribal courts. For over a century, Congress has shown that it can modify tribal court jurisdiction when it wants to. Over a century ago this Court recognized the lack of authority of federal or state courts to act in the absence of an Act of Congress. *Ex Parte Crow Dog*, 109 U.S. 556 (1883) (acknowledging inherent power of tribe to exclusively prosecute murder committed by tribal member). Congress reacted by extending federal court concurrent jurisdiction over enumerated "major crimes" committed by Indians in Indian country.[26] The Major Crimes Act, 18 U.S.C. Sec. 1153 (1988) vests United States with concurrent jurisdiction (with tribes) to prosecute enumerated major crimes committed by Indians on Indian country. Tribes still retain concurrent jurisdiction for major crimes. *Talton v. Mayes*, 163 U.S. 376 (1896) (murder).

With Public Law 83-280 Congress granted mandatory criminal and civil-adjudicatory jurisdiction over Indian country events to five states and authorized other states to assume jurisdiction at their pleasure. Congress later amended the statute in 1968 to require tribal consent before states could assume jurisdiction.[27] Congress spoke specifically with other statutes: The Indian Child Welfare

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[26] Act of Mar. 3, 1885, ch. 341, Sec. 9, 23 Stat. 388 (current version as amended at 18 U.S.C. § 1153 (1988)). The Court upheld Congress' exercise of plenary power over inherent tribal sovereign powers in *United States v. Kagama*, 118 U.S. 375 (1886).

[27] "Without question," the Court wrote in *Washington v. Confederated Yakima Tribes*, 439 U.S. 463, 488 (1979), PL-280 reflects "the general assimilationist policy followed by Congress from the early 1950's through the late 1960's." Congress has clearly abandoned these termination policies in favor of tribal self-government and respecting inherent tribal governmental powers and supporting institutions. 25 U.S.C. § 3601(1)-(6). *See, e.g.*, Carole E. Goldberg, *Public Law 280: the Limits of State Jurisdiction of Reservation Indians*, 22 U.C.L.A. L. Rev. 535 (1975).

Act of 1978, 25 U.S.C. § 1911(a) (affirming tribal courts as holding exclusive jurisdiction to resolve disputes under that federal law); the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, *et seq.*; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (interpreting ICRA to provide for exclusive tribal court jurisdiction over enumerated fundamental rights similar to the Bill of Rights except that habeas corpus relief is restricted to federal courts) and in 1990 amendments to 25 U.S.C. § 1301(2) providing for the definition of "powers of self-government" to mean "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all Indians.*"[28] (emphasis added). Since Congress can act when it wants to, Congressional *inaction* is significant. It would indeed be strange for the Court's policy making in Indian affairs to run counter to the current express will of Congress on these issues.

Regarding the Indian Civil Rights Act ("ICRA"), Congress appears to have assumed tribal courts would exercise civil jurisdiction over non-Indians. The ICRA affords "any person" many of the civil rights protections found in the Bill of Rights. 25 U.S.C. § 1302 (1994). When introduced in Congress, the Bill provided that the civil rights would extend to *"American Indians."* A later amendment changed the language to *"any person."*[29]

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[28] In response to *Duro v. Reina*, 495 U.S. 191 (1990), Congress specifically affirmed tribal court powers over all Indians, not just members of a particular tribe, for one year. Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892. Congress affirmed the inherent tribal criminal jurisdiction powers over non-members permanently in 1991. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646. *See* Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992).

[29] Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1162-63 (1990).

This Court frequently holds that Congress is presumed to legislate with knowledge of caselaw treating an issue. *See, e.g., Fogarty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In light of extensive review of federal statues, and in light of the Congressional actions specifically addressing tribal courts,[30] there can be no doubt that Congress knows of the tribal civil-adjudication case law involving non-members and non-Indians generally.[31] Congress continues to

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[30] *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450, 450a (providing funding and assistance for tribal government institutions, including tribal courts); Indian Reorganization Act, 25 U.S.C. § 476 *et seq.* (providing for reorganization of tribal governments); Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.* (recognizing tribal self-government, establishing tribal courts, establishing for development of model code of Indian offenses for tribal courts); Indian Tribal Justice Act, 25 U.S.C. § 3601 *et seq.* (establishing the Office of Tribal Justice Support within the Bureau of Indian Affairs and authorizing appropriations for assisting tribal courts) and Department of Justice policy supporting development of tribal justice systems, *Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations*, 61 FED. REG. 29,424 (1996).

[31] *See Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n. 15 (1985):

> . . . where . . . Congress adopts a new law incorporating sections of a prior law, Congress can normally be presumed to have knowledge of the interpretation given to incorporated law, at least in so far as it affects the new statutes.

Amici respectfully submit that the same result should obtain when the "incorporated law" is federal common law rather than a statute. *Cf. National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850 (1985):

recognize tribal justice systems as "important forums for ensuring public health and safety and the political integrity of tribal governments" and are "the appropriate forums for the adjudication of disputes affecting personal and property rights." *Id.*[32]

The Court should tread lightly in altering the civil-adjudicatory powers of tribal courts. Congress is the appropriate branch to allocate tribal court civil powers and to address the tensions between tribes and non-members in Indian country. Because such considerations are inherently political and not easily resolved by judicial balancing, this Court should defer to Congress' plenary power to expand or restrict inherent tribal civil-adjudicatory jurisdiction.

II. This dispute does not implicate Eleventh Amendment considerations.

The individuals obtained explicit permission from the tribal court to search Mr. Hicks' home. In granting the warrant, the tribal court did not relinquish jurisdiction; it carefully crafted a narrow directive in the first warrant. Significantly, the tribal court retained supervisory jurisdiction. The individuals had no power in Indian country except that power specifically granted by the tribal court. The tribal court should be allowed to supervise the execution of the warrant and to adjudicate Mr. Hicks' claims.

> Federal common law articulated in rules that are fashioned by court decisions are 'laws' as that term is used in (28 U.S.C. § 1331).

(citing *inter alia County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 235-36 (1985)).

[32] Congressional intent reflected in the report accompanying the Indian Tribal Justice Act found that "tribal courts are permanent institutions charged with resolving the rights and interests of *both Indian and non-Indian individuals.*" S. Rep. No. 88, 103rd Cong., 1st Sess. 8 (1993) (emphasis added).

The individuals are sued only in their individual capacities. Pet. App. A5, A13, A23 n. 13. The State of Nevada's immunity under the Eleventh Amendment is not implicated. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) (distinguishing individual and official capacity suits). Mr. Hicks dismissed his claims against the State five years ago. There is a presumption that public officials are entitled to qualified, rather than absolute immunity. *Burns v. Reed*, 500 U.S. 478, 484-92 (1991). Assuming arguendo that Mr. Hicks' allegations are true, it is not within the scope of the individuals' duties to violate the Bill of Rights, the ICRA and tribal common law prohibitions against unreasonable search and seizures. Violating the Bill of Rights or similar laws is not within the actions normally taken in the course of discharging official responsibilities, especially by a state officer on the reservation, in Indian country under an explicit directive from the tribal court.

The individuals' duties *do not* include enforcing state laws in Indian country on the tribe's reservation. The State of Nevada has no reason to exercise "sovereign responsibilities within the Reservation." (*See* States Att. Gen. Amici Brief at 28). Nevada's arguments regarding state sovereignty are unavailing. Mr. Hicks alleges the individuals exceeded the scope of the warrant or acted under invalid warrants. The tribal court is not exercising powers over the State of Nevada, only the individuals that allegedly violated the express terms of the tribal warrant.

The result of adopting the Petitioners' view here, would be that a state court would have no jurisdiction to try a civil action against an individual tribal officer who served a warrant outside the tribe's Indian country and within that state, when the allegations were that the tribal officer had violated or exceeded the express limitations imposed by the state court when it approved the warrant.

That is simply not good law or policy.[33] Neither is the position adopted herein by the Petitioners.

The State of Nevada complains that the tribe has turned *Williams v. Lee* from a shield into a sword. Br. 19. It is the individual officers who came onto the reservation, who came onto trust land and who allegedly exceeded specific permissions provided by the tribal court. Mr. Hicks seeks relief in tribal court as a shield to protect his civil rights. The tribal court should decide the as-yet unasserted qualified immunity defenses in the first instance.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[33] Non-Indian state and local government requests for assistance from tribal law enforcement agencies are not unusual. *See* "Cherokee Nation Marshals Make Meth Arrest", *Oklahoma Indian Times*, January, 2001, at p. 4-5 (detailing Grove, Oklahoma municipal Police Chief Miller's request for tribal police assistance because the Cherokee Marshals had special expertise in methamphetamine drug interdiction methods). Effective regional government for Indians and non-Indians alike depends on comity and cooperative government-to-government relationships.